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IN THE

Supreme Court of the United States

In the Matter of the Visitation of NATALIE ANNE TROXEL AND ISABELLE ROSE TROXEL, Minors, JENIFER AND GARY TROXEL,

Petitioners,

v.

TOMMIE GRANVILLE,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

REPLY BRIEF

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I. THE WASHINGTON SUPREME COURT'S INTERPRETATION OF SUBSTANTIVE DUE PROCESS WAS UNSOUND.

The Supreme Court of Washington adopted a single, straightforward constitutional rule -- that the Due Process Clause forbids a state from ordering visitation in favor of a grandparent unless there would, in the absence of such an order, be injury to "the physical or mental health of the child." (Pet.App. 20a). The state statute at issue was declared unconstitutional because the court below believed that advancing the best interests of a child is not of sufficient importance to justify a visitation order.[1]

Respondent's brief does not defend, nor even refer to, the constitutional rule actually adopted by the court below. That brief contains no reference whatever to any requirement of injury to "physical or mental health." Respondent offers two descriptions of the holding of the Washington Supreme Court, neither of which makes any mention of that court's requirement of injury to the physical or mental health of the child. (R.Br. 17, 35).

Respondent's argument for affirmance rests instead on other grounds, raising a variety of new constitutional contentions unrelated to the magnitude or type of harm at

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[1]Respondent asserts that visits with the girls have at all times been available to petitioners; "[a]ll the Troxels had to do was ask to visit." (R.Br. 47). Petitioner's requests were rejected (R.P. 31) and telephone contact was discontinued. (R.P. 190) Requests for visitation went through the lawyers out of respect for the fact that Respondent had a lawyer. (R.P. 33, 36-37) It is petitioners' position that such requests have in fact been rejected. At this point in the proceedings no purpose would be served by spelling out the events which gave rise to this difference.

issue.[2] Respondent's proffered "Restatement of Question Presented for Review" refers only to several of these new arguments, not to the "physical or mental health" standard adopted and applied by the court below. (R.Br. i). Respondent's brief states explicitly what is implicit in its overall structure--that a statute which satisfied these newly articulated objections would be constitutional.[3] The list of safeguards which respondent insists would assure the constitutionality of a statute does not include any requirement of a showing of injury to the physical safety or mental health of the child.[4]

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[2]We discuss the merits of these alternative arguments in part II, infra.

[3] R.Br. 39 ("Respondent does not contend that the states are constitutionally barred from ever granting grandparents, or others who can establish a significant relationship with a child, the right to court-ordered visitation. Indeed, some of the third party visitation statutes adopted and interpreted by the various states protect parental rights--through standing requirements, presumptions, burdens of proof, and recital of specific factors that require a court to consider family autonomy in defining a child's best interest.") Although respondent does not list the statutes of which she approves, no state statute specifically requires evidence of physical or mental harm to the child.

[4]In several passages, respondent suggests that impairment of the best interests of the child is precisely the harm required by the Constitution, so long as that harm is clearly established. R.Br. 7 (state court properly held that parental denial of visitation cannot be interfered with by the state "absent a showing of harm--that is, a showing that the parent is not in fact acting the child's best interest")(emphasis in original), 17 (statute constitutionally defective because it does not place on grandparent the "burden of proving that the parent's decision is not in a child's best interest--that is, that it would harm the child.") Proof that visitation would be in the best interest of a child is proof that the rejection of the grandparents' visitation request was contrary to the best interest of the child.

Respondent's brief does contain several assertions which, if persuasive, might tend to support the holding of the court below. Respondent suggests that under the common law it was "the unanimous practice" of the states to deny visitation requests by grandparents. (R.Br. 21, 42). In our opening brief, we set out common law decisions from ten different states approving just such visitation orders (Pet. Br. 30-31 n.45); respondent does not dispute our characterization of, or even refer to, this well established line of cases. Respondent invokes from past decisions of this Court generally phrased statements regarding the rights of parents. (R.Br. 20-23). Such passages cannot be given force or meaning unrelated to the specific state practice in dispute. None of the quoted passages arose in a case presenting the sort of intra-family problem at issue here.

We earlier noted that the decisions of this Court insist that all affected familial interests must be considered in assessing the constitutionality of a statute alleged to interfere with the interests of any one family member. (Pet. Br. 35-48). Respondent insists, variously, that constitutionally significant familial interests are limited to "psychological parent[s]," persons who are "the functional equivalent of [a] parent" or persons with a "significant relationship with a child." (R.Br. 41, 42)[5]. The various amici which have filed briefs in support of respondent differ emphatically about the constitutionally appropriate definition of a family relationship. On the one hand, the Society of Catholic Social Scientists would recognize only the relationship between a child and his or her biological parents[6], and the American

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[5] The meaning of these formulations is unclear. The petitioner in *Wolcott* had, in fact, lived with the mother and raised the children for four years. Respondent dismisses him as a boyfriend.

[6]Brief Amicus Curiae of the Society of Catholic Social Scientists in

Center for Law and Justice would acknowledge constitutional protection solely for the relationship between a married couple and the children born to them after their marriage.[7] On the other hand, the Lambda Legal Defense and Education Fund argues that constitutional protection should extend to all adults involved in raising a child, without regard to marital status, biological relationship, gender, or sexual orientation.[8] The National Association of Counsel for Children would include all relatives who are living together, as well as other relatives with a "substantial relationship" with a child[9], while the Center for Children's Policy Practice and Research insists that the state should safeguard a child's relationships with all "extended family and unrelated kin" with whom the child may have an "attachment relationship."[10] The quite considerable disagreement about these issues illustrates why this Court should avoid any unnecessary pronouncements regarding the types of familial relationships which the Constitution permits, or requires, a state to respect.

(Cont'd) Support of Respondent, 9.

[7]Brief Amicus Curiae of the American Center for Law and Justice Supporting Respondent, 4, 5, 9.

[8]Brief of Lambda Legal Defense and Education Fund and Gay and Lesbian Advocates and Defenders as Amici Curiae in Support of Respondent, 4, 9 n.4.

[9]Amicus Curiae Brief [of the National Association of Counsel for Children] in Support of Respondent, 18.

[10]Brief Amicus Curiae Center for Children's Policy Practice & Research at the University of Pennsylvania in Support of Respondent, 10, 20.

At least two amici, enthusiastically embracing the holding of the Washington Supreme Court that parents have a constitutional right to restrict the ideas to which their children are exposed, suggest that that right would indeed extend to controlling what is read or said in a public school.[11] Respondent seeks to avoid this consequence of the decision below by insisting that actions by public school officials cannot violate constitutional rights so long as school attendance is voluntary, and parents are therefore free to home school their children or send them to private schools. (R.Br. 41). But that argument surely proves too much; if adopted by this Court, this approach could vitiate the entire body of constitutional rights now enjoyed by pubic school children, since home schooling and private schools are legal in every state in the union. E.g. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943).

In our opening brief we noted that respondent had not identified any particular aspect of the visitation order in this case which she claimed was so intrusive as to create a specific constitutional problem. Respondent now identifies three such provisions. (1) "A court decreed how [respondent's] daughter Isabelle should be addressed." (R.Br. 47). This provision was expressly requested by respondent herself; "Isabelle" was the name which respondent had chosen to use, and she successfully sought an order requiring petitioners to utilize the same name.[12] (2) "Tommie

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[11]Brief Amicus Curiae of Christian Legal Society and the National Association of Evangelicals in Support of Respondent, 24-30; see Brief Amicus Curiae of the Society of Catholic Social Scientists in Support of Respondent, 10.

[12]Counsel for Respondent asked for this provision in his opening (Cont'd)

Granville Wynn was ordered to consult with the Troxels before discussing family matters with her children." (R.Br. 47). The decree only requires consultation between the parties about what would be said to the girls about the circumstances of their father's death. Again, this provision was successfully requested by respondent herself, for the purpose of preventing petitioners from discussing that matter with the girls without prior consultation.[13] (3) "Tommie Granville Wynn was ordered . . . to notify [petitioners] of her children's activities." (R.Br. 47). The decree only requires notification regarding extracurricular activities, school plays, open houses, sports events, performances and recitals. (Pet.App. 78a) Respondent's state court appeal from the decree did not object to or even mention this provision; her December 1999 brief in this Court marks the first time in the four year history of this litigation that she has specifically

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(Cont'd)
statement: "This is where the rub is. ... The grandparents are calling Isabelle, Rose. Rose is Isabelle's middle name. Parents call Isabelle, Isabelle and grandparents call Isabelle, Rose. (R.P. 11) see also (R.P. 13, 47, 50, 221). Jenifer Troxel answered "No" to question by Respondent's counsel whether she would object if the court ordered her or if Tommie Wynn [Granville] asked her to never call Isabelle "Rose" again. (R.P. 30)

[13]Respondent's counsel argued during the trial that there was a dispute between the parties about discussing the father's suicide. Respondents' counsel asked for this provision during his opening statement: "This is where the rub is. ...The information we have [sic] the grandparents have talked about the grandchildren's father['s death] without discussing it with the parents, without discussing how they want to handle it." (R.P. 11) See (R.P. 47-49) Respondent's expert testified that to avoid harming the children, the parties should "...make sure there is an agreed upon... position about the [father's] death, ...to have a unified position among adults... use a third person to help them sort it out." (R.P. 82-83) see (R.P. 87-88, 197).

done so.[14]

II. THE ALTERNATIVE GROUNDS FOR AFFIRMANCE ADVANCED BY RESPONDENT SHOULD NOT BE ADOPTED BY THIS COURT

Respondent's brief presents a new wide-ranging list of

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[14]Respondent also asserts that the order in the *Smith* case was overly (Cont'd) intrusive because it provided that the mother was to give the grandparents her parenting rules. Respondent suggests that this provision was included so that the grandparents could then review and criticize those rules. (R.Br. 14, 47).

In fact, this provision was requested by the mother herself in order to assure that the grandparents would conform their own actions to the rules the mother had established. The Guardian ad Litem, Claire Reiner, wrote in her report:

> Ms. Stillwell also objects on the basis that the extended family does not respect her parenting boundaries. It is the Guardian Ad Litem's observation that in fact this is born out in fact. Some of this may be due to the fact that Ms. Stillwell has extremely tightly drawn parental boundaries. For example, she was extremely upset that 3 balloons were given to her child instead of 1. While this might not be where every parent draws their boundary, certainly the fact that Ms. Stillwell draws her boundary there has to be respected by the extended family." (C.P. 57) "The Petitioners should be directed to respond to and obey the parental guidelines for gifts and other conduct of the child whether they particularly agree with that or not..." (C.P. 78)

Respondent also objects that the order in *Smith* included guidelines regarding gifts and telephone calls. (R.Br. 14). This aspect of the order was included at the request of the mother to constrain actions by the grandparents as noted above regarding the number, type and timing of gifts from the Petitioners. The order established times for the parties, including the mother, to call Sarah. (CP 15-16).

purported constitutional defects in RCW 26.10.160(3). Delineating the number of distinct constitutional arguments is difficult, since many of these asserted defects are accorded only an abbreviated analysis, and respondent's constitutional theory is not always spelled out. Overall, respondent appears to contend that RCW 26.10.160(3) has a dozen different defects, each of which would assertedly render it unconstitutional: (1) The statute assertedly does not place on a petitioner the burden of proving that visitation would be in the best interest of the child. (R.Br. 11, 35, 36). (2) The statute assertedly does not require a finding that visitation will in fact be in the best interest of the child. (R.Br. 31). (3) The statute does not require a petitioner to adduce "clear and convincing evidence" that visitation would be in the best interest of the child. (R.Br. 38). (4) In assessing whether visitation is in the best interest of a child, courts are not required to defer to parents' beliefs to the contrary. (R.Br. 29, 32, 37). (5) "Best interest of the child" is too vague a standard to provide a meaningful guidance for the exercise of the trial judge's discretion. (R.Br. 21, 37). (6) The individuals authorized to seek visitation under the statute are not limited to grandparents or others with a substantial preexisting relationship with the child. (R.Br. 21, 32-33). (7) A visitation petition may be filed at any time, and is not limited to the period when a custody proceeding is pending between the parents. (R.Br. 21, 33). (8) After visitation has been awarded, the petitioners may seek modification of that order at any time. (R.Br. 12). (9) Visitation proceedings impose an undue financial burden on the parent. (R.Br. 40, 45-47). (10) Visitation proceedings entail an undue risk of public embarrassment of the parent or petitioning grandparent. (R.Br. 45, 46). (11) In practice, visitation orders invariably involve intrusive micro-management of the parent-child relationship. (R.Br. 16, 40, 47) (12) Parents who violate visitation orders are subject to fines or imprisonment.

(R.Br. 11, 40).

Respondent did not raise any of these issues in the courts below; rather, she there advanced the straightforward but very different contention that a state could not constitutionally order grandparent visitation at all.[15] The only constitutional issue actually decided by the Washington Supreme Court was whether protecting the best interest of a child is a sufficiently important state purpose to justify a visitation order.[16]

Where, as here, a case is before this Court on certiorari to a state court, due respect for the integrity of a state's judicial processes militates against consideration by this Court of wholly new constitutional arguments not raised

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[15]"[']Parents have the responsibility to make decisions . . . for the care and growth of their minor children. ['] . . . Interference with this right and responsibility, is unconstitutional. As a parent, Tommie Granville [Wynn] should have the right to decide when and how grandparent visitation is accomplished. While normally grandparent contact should be encouraged, it is too intrusive for the state to legislate, and for judges to decide based on this legislation, when and how this should occur." Appellant's Supplemental Opening Brief, No. 36737-4-I (Wa.Ct.App. Div. 1), p. 14.

Respondent expressly acknowledges that under the constitutional arguments she now advances in this Court, a state could constitutionally adopt such legislation. (R.Br. 39) A brief on the constitutional issues was also filed in *Stillwell-Smith*. It too raised none of the issues now in Respondent's brief in this court.

[16]The opinion also comments that the statute lacks sufficient safeguards against the filing of "frivolous" lawsuits. (Pet. App. 22a). But the opinion does not hold that this asserted defect rendered the statute unconstitutional. In the court below, respondent emphatically, and in our view correctly, insisted that this part of the opinion did not represent a constitutional holding. Answer to Motions for Reconsideration, No. 65605-3, 7, 9.

in the state courts. Legal arguments do, and often should, evolve during the course of appellate litigation, and the interests of justice would be ill served by the adoption of any rigid exhaustion-like requirement. But where, as here, a litigant effectively abandons the particular constitutional theory on which it prevailed below, and instead offers a dozen new constitutional arguments which the state courts were never accorded an opportunity to consider, this Court should exercise its discretion not to address those new issues. As is true in all the states, court rules in Washington set specific schedules for the filing of briefs; ordinarily those deadlines are intended to fix a time by which litigants are required to set out their basic legal or factual contentions. In the instant case respondent's last brief in the Washington Supreme Court was due on February 6, 1998; additional constitutional issues only raised in a brief filed after that deadline would not have been considered by the state courts. No reason is offered as to why respondent should be allowed to evade that state court deadline by raising numerous wholly new issues for the first time in this Court.

Evaluation of many of respondent's new contentions would require in the first instance an interpretation of state law; in the absence of an authoritative construction by the state's highest court, it will often be impossible to know what constitutional issue, if any, actually needs to be resolved.[17] For example, although respondent seems to assert that petitioners do not bear the burden of proof in visitation

[17]Respondent objects that the Washington Supreme Court was unable to construe the statute in a manner which would "avoid constitutional infirmities." (R.Br. 19). But the only asserted infirmity which was asserted in that court, and thus the only asserted infirmity which the court was unable to avoid by construction, was in the absence of a statutory requirement of injury to the physical or mental health of the child.

proceedings under RCW 26.10.160(3), the Washington Supreme Court has never so held. The general rule in Washington is that the party seeking any judicial decree bears the burden of proof[18]; it would be surprising indeed if RCW 26.10.160(3) were interpreted in any other manner. The parties were clear as to who bore the burden of proof at trial.[19] This is not a case like *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849 (1999), in which a state's highest court refused to construe a statute in a manner which might have resolved a pending constitutional challenge; rather, the instant case is one in which the constitutional objection at issue was never raised in the state court at all.

Similarly, respondent's contention that the "best interests of the child" standard in RCW 26.10.160(3) is impermissibly vague, had it been raised in state court, would have required the Washington courts to construe that phrase. It is exceedingly unlikely that the state courts would have interpreted this phrase in a manner which left trial judges utterly without meaningful guidance as to how to decide these cases. Two other Washington statutes already provide state judges with specific illustrations of what this phrase means.[20] The phrase "best interest of the child" is used in

[18]*Marriage of Sheley*, 78 Wn. App. 494, 503 895 P.2d 850 (1995) *Marriage of Hall*, 25 Wn. App. 530 536, 607 P.2d 898 (1980).

[19] Petitioners acknowledged in opening statement during trial, that they had the burden of proof under the statute. (R.P. 6) Counsel for Respondent also acknowledged this. (R.P. 196)

[20]RCW 26.09.240(6) lists seven specific considerations which would be "relevant to the child's best interest." See Pet. Br. 27a-28a. RCW 26.09.002 states that the best interest of a child is served by arrangements that further the child's "emotional growth, health and stability, and physical care."

literally hundreds of statutes in Washington and the other states, and has been the subject of innumerable state court interpretations. There are some twenty-four other Washington statutes, (Appendix A) and twenty federal laws, (Appendix B) which use this same phrase. The decisions of this Court have repeatedly held that the constitution itself requires that certain determinations be made in the "best interest of the child.[21] Respondent does not contend the phrase is always, or even ordinarily, unconstitutionally vague; to the contrary, respondent apparently concedes that the phrase is sufficiently clear to pass constitutional muster in other contexts, such as regarding custody or visitation disputes between two parents. (R.Br. 27-28)[22]. Under these circumstances it is entirely likely that, had respondent advanced this vagueness objection in the courts below, the Washington courts would have construed RCW 26.10.160(3) in a manner which would have resolved any constitutional problems. By failing to raise this issue in the state courts, respondent deprived them of any opportunity to do so.

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[21]*Bellotti v. Baird*, 443 U.S. 622, 644, (1979); *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 452 (1983); *Lambert v. Wicklund*, 502 U.S. 1169, 1172 (1997); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 873, 970 (1992); *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 91 (1976); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 50 (1989).

[22]The best interest of the child remains the touchstone of custody law in Washington. "In any proceeding between parents under this chapter, the best interest of the child shall be the standard by which the court determines and allocates the parties' parental responsibilities." RCW 26.09.002.

If in the instant case, if petitioner, Gary Troxel, had been the girls' father, rather than their grandfather, respondent evidently acknowledges that the best interest of the child standard would have been sufficiently clear to be applied to resolve a visitation dispute.

Many of respondent's new constitutional arguments can only be assessed in the context of other related aspects of Washington domestic relations statutes, laws about which the state courts would be uniquely knowledgeable. For example, respondent contends that RCW 26.10.160(3) is unconstitutional because it requires a parent to air in public potentially embarrassing differences with the petitioning grandparent. Court rule, however, expressly provides that both the files and any hearing in a family law matter may be closed to the public where necessary to prevent such embarrassment. Wash.Gen.R. 15(c)(2)(B). Respondent's brief in this Court makes no mention of this protective procedure, with which state judges would be familiar, and advances no argument suggesting that that process would be insufficient to address any possible constitutional problems.

A number of the new issues raised by respondent could not be resolved without the sort of record that is wholly lacking in the instant case. Respondent contends, for example, that grandparent visitation actions will involve a high degree of economic coercion because the plaintiffs will ordinarily be affluent older couples well able to afford attorneys and experts, while the defendants will be impoverished single mothers. Virtually no empirical information is offered to substantiate this assertion. The actual defendant in this case is a married woman whose household income for 1998 was in excess of $99,000, and she was the only party to present expert testimony.[23] In a substantial majority of the visitation cases that arise after the

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[23]In a financial declaration filed in the Supreme Court of Washington in February, 1998, in support of her request in her Answer for Petition for Review for counsel fees, respondent stated that her monthly household income was $8,304.

death of a parent, the deceased parent is the mother, so the surviving parent and defendant is the father.[24] Washington statutes make specific provision for the possibility that inequality in the resources of the parties will result in unfairness or coercion in family law litigation. An impecunious litigant can obtain, at the very outset of a lawsuit, an award of counsel fees from the opposing party, and fee awards can be made in favor of the losing as well as the prevailing party, where he or she has substantially less income or resources than the opposing party. RCW 26.09.140 and RCW 26.10.080. Respondent does not explain why these generous provisions for counsel fee awards would not be sufficient to resolve the problems which she asserts exist.

Many of the new issues raised by respondent concern the manner in which a determination would be made regarding whether visitation is in the best interest of a child. But in this case that underlying question simply was not in dispute. At the very beginning of the hearing, counsel for respondent stated on the record, "[W]e'd like to say that our position is that grandparent visitation is in the best interest of the children." (J.App. 31a). In light of that stipulation, it is impossible to understand how it would matter in this case which party would have had the burden of proof on this issue, whether deference was owed to respondent's views, whether a heightened standard of proof should have been applied, or whether there is ambiguity in the phrase "best interest of the child."[25] No decision on such constitutional

[24]Pet. Br. App. B (in 83 of 140 cases involving one dead parent, the deceased parent was the mother).

[25]Similarly, one of respondent's own experts expressly agreed that the visitation dispute should be resolved based on "what is in the best interests of the children." (R.P. 72). "...an appropriate grandparent (Cont'd)

questions would affect the outcome of the instant case.

The same is true of many of respondent's new constitutional arguments. Although respondent objects that in theory a total stranger might sue under RCW 26.10.160(3), the actual petitioner in this case was the girls' grandparents. While respondent complains that visitation orders are subject to modification at any time, no such modification was ever sought by petitioners during the three years that the disputed visitation order was in effect. It is true, as respondent notes, that in theory under Washington law violations of domestic relations orders could result in contempt citations and punishment, but respondent does not claim that she ever violated, or was even alleged to have violated, the order in this case. Respondent insists that her views on the best interests of the children should have been given deference by the trial judge; in fact, the trial judge explained that he had done just that.[26]

(Cont'd)
grandchild visitation is one that is aimed at what the child's needs are, and that those needs are primary." (R.P. 70)

[26] R.P. 214-215. The particular provision of the visitation order to which respondent specifically objected in the courts below was the authorization of overnight visits. If respondent had testified at trial, based on her personal knowledge of the maturity and sensitivities of the two girls, that they were not ready to spend nights away from home, and had explained why they were unable to do so despite having stayed at petitioner's home when they were even younger, we assume the trial judge would have attached considerable weight to her views. But respondent never testified about this factual issue at all. Rather, she based her opposition to overnight visits solely on proffered expert testimony that all children of the girls' ages are too young to stay overnight away from their home, testimony that offered no account of the fact that these children had in fact done so for several years prior to their father's death. (R.P. 160)

Respondent insists that in the resolution of visitation disputes deference should be paid to parental views about the best interests of the child. That might raise a significant constitutional question in a case in which both parents believed that visitation was contrary to the interest of the child. But in this case it is undisputed that the girls' father, while he was alive, believed that it would be in their interest to visit regularly with their paternal grandparents. Respondent does not explain why the same constitutional principle which, on her view, would once have required deference to Brad Troxel's beliefs about the best interests of the girls could now forbid any consideration of those very beliefs. Whatever the merits of respondent's insistence that the Constitution requires deference to parental views, that argument cannot provide a basis for attacking the visitation order in a case such as this.

Respondent apparently maintains that she is entitled to a decision forbidding the application to her of RCW 26.10.160(3) if she can show that some imaginable application of that statute to other persons in other circumstances would be unconstitutional.[27] But respondent can prevail only if she demonstrates either that the statute is unconstitutional as applied to her, or that the law is facially unconstitutional because it would be invalid in all or almost all cases. Respondent has met neither burden. The fact that this case originated in state courts does not alter that requirement. If a statute does not fail the constitutional standard for facial invalidity, it simply is not facially invalid under the United States Constitution. A state court could

[27]Respondent does not make a persuasive showing that such other circumstances are widespread; she does not, for example, identify a single case in which a stranger has ever sought visitation rights under any of the statutes that have been in effect for the last several decades.

hold that a statute is facially invalid under the state constitution merely because it would be invalid in occasional or even unlikely circumstances, but that would be an application of state constitutional law. Insofar as a state court purports to be applying the federal constitution, it is constrained to use federal Constitutional standards.

Relying on two sentences in a footnote to the opinion of three members of this Court in *City of Chicago v. Morales*, 572 U.S. 41, 119 S.Ct. 1849 (1999), respondent insists that state courts are not constrained by the prudential standing doctrine of jus tertii. (R.Br. 18). Regardless of whether that passage may command the support of a majority of this Court, it is irrelevant to the instant case. First, the jus tertii doctrine has no bearing here. That principle generally bars one party from bringing an action because it has been injured by a violation of the rights of a third party. *Warth v. Seldin*, 422 U.S. 490, 499-500 (1975). Even if RCW 26.10.160(3) would be unconstitutional if applied to some other individual, a visitation order concerning the unidentified children of some unknown parents could not possibly cause injury to respondent herself. Absent such actual injury, respondent lacks Article III standing to litigate the wide variety of new issues raised in her brief. Second, the Washington Supreme Court did not purport to disregard jus tertii problems in resolving in respondent's favor the now proffered alternative grounds for affirmance; rather, that court simply did not resolve those proffered grounds at all.

The numerous amicus briefs that have been filed in this case articulate a wide variety of concerns about the manner in which any decision by this Court might affect family law issues far removed from the specific question of grandparent visitation. Nothing in our briefs should be understood to minimize the importance of those concerns, or

to suggest that in other contexts they might not pose substantial constitutional questions. Procedural due process might well be violated by a judicial process so formalized or expensive that it has the effect of denying indigent litigants a meaningful opportunity to be heard. The failure of a state to protect women from domestic violence, for example, would implicate the very core of the original meaning of the Equal Protection Clause.[28] The evolving response of the states to non-traditional parenting and domestic relationships raises issues of considerable sensitivity and complexity which the Constitution requires be resolved in a manner untainted by irrational or gender-based or other irrational prejudices. The quite specific constitutional question raised by the instant case can and should be determined in a narrow manner, leaving for another day consideration of the other broader constitutional issues identified by amici.

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[28] *Brzonkala v. Morrison*, (U.S. Docket No. 99-29), Violence Against Women Act of 1994, 108 Stat. 1916, 42 USC § 13931 et.seq.

Respectfully submitted,

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APPENDIX

APPENDIX A –WASHINGTON STATE STATUTES USING "BEST INTEREST" PHRASE

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RCW 13.34.230 Guardianship for dependent child--Petition for--Notice to, intervention by, department

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